

Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 27-2009

KENT H. FARGHER)	
Complainant,)	
-vs-)	INVESTIGATIVE REPORT
)	AND
BUTTE POLICE PROTECTIVE)	NOTICE OF INTENT TO DISMISS
ASSOCIATION,)	
Defendant,)	
)	

I. Introduction

On June 22, 2009, Kent H. Fargher, filed an unfair labor practice charge with the Board of Personnel Appeals alleging a violation of 39-31-402 MCA. Named in the complaint were Russ Robertson, Ray Vaughn and "certain members of the BPPA Grievance Committee" whose actions coerced or restrained Officer Fargher's rights guaranteed in 39-31-201 MCA.

Officer Fargher is representing himself in this matter. The Butte Police Protective Association, hereinafter BPPA or the Association, is represented by Karl Englund, attorney at law. Mr. Englund has responded to the charge first raising the question as to the correct defendant to the charge, and secondly denying any violation of the duty of fair representation on the part of the Association.

John Andrew was assigned by the Board to investigate the charge and has communicated with the parties in the course of the investigation.

II. Findings and Discussion

Before turning to the facts of this case the issue of the correct defendant needs to be addressed. Officer Fargher's complaint names individual members of the bargaining unit as well as unnamed members of the grievance committee as defendants. In fact, Officer Fargher has told the investigator that he has no particular problem with the Association or its members as a whole. His belief is that that some members of the Association, including officers in the Association, acted against his interests in

1 contravention to their duty to him and the bargaining unit. The overriding nature of the
2 complaint is that "I have been denied positive union representation in a recent dispute
3 with the Sheriff's Department Administration". Allegations by Officer Fargher against
4 individual members of the bargaining unit notwithstanding, the overall nature of this
5 complaint is whether those members overstepped their bounds or whether they were
6 acting within the scope of their responsibilities. The evidence shows they were acting
7 within the scope of their roles as agents of the Association. The proper defendant is the
8 BPPA and not the individuals named in the complaint. Personal liability does not apply.
9 See for instance, Evangelista v. Inland Boatmen's Union of the Pac. 777 F.2d 1390, 121
10 LRRM 2570 (9th Cir. 1985), Williams v. U.S. Postal Service, 834 F. Supp 350, 148
11 LRRM 2764, *aff'd sub nom Williams v. Letter Carriers*, 35 F.3d 575 (10th Cir. 1994), *cert.*
12 *denied*, 513 U.S. (1995), and Atkinson v. Sinclair Refining Co., 370 U.S. 238, 50 LRRM
13 2433 (1962), a 301(b) case addressing individual immunity from liability.
14

15
16 Officer Kent Fargher has been employed by the Butte Silver Bow Police Department for
17 over 30 years. The root of this complaint is found in disciplinary actions taken against
18 Officer Fargher for his actions in two incidents in which he was involved. The first one,
19 Crime Report 209CR0004790, involved the use of force by Officer Fargher. Officer
20 Fargher bumped another vehicle with his vehicle following a high speed chase. This
21 incident occurred on March 1, 2009, and the question was whether or not Officer
22 Fargher reported the use of force as required by department policy. The second
23 incident, 209CR0005465, occurred on March 10, 2009, and involved an assault at the
24 Cinz Bar. The issue in this incident was the thoroughness of his investigation and
25 incident report. Officer Fargher was working the graveyard shift at the time of both
26 incidents.
27

28 On March 10, 2009, Officer Fargher was placed on administrative leave by Operations
29 Captain George Skuletich pending investigation of the two incidents. Captain Skuletich
30 delivered the administrative leave letter to Officer Fargher at the station. Officer Dan
31 Murphy, past president of the BPPA, accompanied Officer Fargher to the meeting. At
32 the conclusion of this meeting Officer Murphy advised Officer Fargher that he would be
33 better off to get someone more involved in union matters to assist him as Officer
34 Murphy had not been recently involved in handling such matters.
35

36
37 Officer Fargher next contacted BPPA Vice President Jeff Williams for assistance. He
38 had also tried to contact Russ Robertson, BPPA President, but had been unable to
39 reach him. Jeff Williams is a sergeant with the department and is an assistant shift
40 commander on the graveyard shift. Russ Robertson is also a sergeant and assistant
41 shift commander on the graveyard shift as well. On the night of both incidents
42 Sergeants Williams and Robertson were acting shift commanders as Lieutenant Mark
43 St. Pierre, the regular shift commander, was off. Assistant shift commanders and shift
44 commanders have no control over discipline and only report incidents to the shift
45 lieutenant or captain respectively. Captains decide whether additional investigation is in
46 order. According to Officer Fargher, Sergeant Williams believed there might be issues if
47 he assisted Officer Fargher so Sergeant Williams arranged for Officer Lew Griffith to
48 assist Officer Fargher as the incidents were investigated. Officer Fargher refers to his
49 interaction with Sergeant Williams as a "conflict of interest". Officer Fargher's complaint
50 centers around his belief that Sergeant Williams acted properly in stepping away from

1 the grievance whereas Sergeant Robertson was in error when he did not step away.
2 The belief of Officer Fargher as framed in his complaint is that "Union President
3 Robertson did then misuse his office to deny me proper and positive representation
4 through personal influence and improper conflict of interest". The "conflict of interest" is
5 not only Sergeant Robertson's involvement in processing the grievance, but also
6 involvement in the Cinz Bar incident and any related discipline arising from that incident.
7

8 The afternoon of March 12, 2009, Officers Griffith, Murphy and Fargher met with
9 Captain Skuletich. At this time Officer Fargher was returned to duty as the investigation
10 progressed.
11

12 On March 24, 2009, Officers Murphy, Fargher and Griffith again met with Captain
13 Skuletich. At this time disciplinary letters addressing the two incidents were given to
14 Officer Fargher. The discipline for incident 209CR0004790 was a one day suspension
15 without pay. In the case of the Cinz Bar incident Officer Fargher was given a written
16 reprimand to remain in Officer Fargher's file for six months.
17

18 A grievance committee was appointed by President Robertson on April 7, 2009.
19 Grievance committees are a standing committee whose usual term is uncertain to the
20 investigator. Vice President Williams announced the membership as Officer Ben
21 Rauch, Officer Chris Berger, Officer Josh Stearns, Sergeant Pat Sullivan and
22 Dispatcher Charlene Macioroski. None of the individuals appointed to the grievance
23 committee had served on the grievance committee previously. They were all new to the
24 process. Sergeant Williams' e-mail announcing the committee members was sent to
25 40 members of the Association, including Officer Dan Murphy. Sergeant Williams also
26 invited those addressed to advise him if he missed anyone on his e-mail.
27

28 On April 9, 2009, the grievance committee met with Officer Fargher and Officer Griffith.
29 Charlene Macioroski agreed to be chair as she had experience on the negotiating
30 committee and, at least in that vein, had more committee experience than the other
31 members. The committee decided a grievance was in order and pursuant to Step 1 of
32 the grievance procedure notified Captain Skuletich of the grievance.
33

34 On or about April 9, 2009, Officer Fargher requested copies of the two incident reports.
35 He received the one on the intentional contact issue and in that discovered an e-mail
36 from Sergeant Robertson to Captain Skuletich. The e-mail from Sergeant Robertson to
37 Captain Skuletich was dated March 10, 2009 at 2:15 a.m. and was in response to an e-
38 mail dated March 9, 2009, at 12:19 p.m. from Captain Skuletich to Sergeant Robertson
39 and Sergeant Williams asking them if they had "any more information concerning the
40 pursuit by Officer Fargher". Sergeant Robertson's response amongst other information
41 contains Sergeant Robertson's opinion that "it was apparent that officer Fargher was
42 covering up the incident at that time . . ." Regarding the Cinz Bar incident it is also
43 clear that on March 10 Sergeant Robertson and Sergeant Williams both had concerns
44 about how the incident report was handled by Officer Fargher and they had reported
45 their concerns to Captain Skuletich and Investigations Captain Conway. Captain
46 Conway followed up agreeing with Robertson and Williams that the report was deficient
47 and that standard evidence gathering procedure – tape recordings and pictures of the
48 scene of the incident – were not in the report. The case was subsequently referred to
49 detectives for further work.
50

1 On an unknown date Charlene Macioroski notified Officer Fargher that a meeting with
2 Sheriff Walsh to discuss the disciplinary letters was set for April 21, 2009. According to
3 Officer Fargher, Ms. Macioroski also led Officer Fargher to believe there were some
4 problems developing in the grievance committee involving where some members were
5 getting their instruction or if they were keeping open minds. Apparently the rumor mill
6 also had it that Sergeant Robertson had received the same disciplinary letter for the
7 Cinz Bar incident as had Officer Fargher. For that reason Officer Fargher believed that
8 that some members of the grievance committee thought the whole thing should be
9 dropped. Officer Fargher's belief was that Sergeant Robertson was behind the scenes
10 on all of this.

11
12 On April 21, 2009, the grievance committee and Officer Fargher met with Sheriff Walsh.
13 By this point in time there were already factions in the grievance committee with some
14 members supporting going forward with the grievance and others opposed. The
15 problem manifested itself when at this meeting Officer Stearns rose to say, in the
16 presence of the sheriff, that he did not support the Cinz Bar grievance going forward.
17 The sheriff stood by his decision to discipline Officer Fargher. After this meeting Officer
18 Fargher confronted Officer Stearns about his actions and what Officer Fargher saw as a
19 bias – a bias Officer Fargher believed was fed by Sergeant Robertson. This discussion
20 between Officer Fargher and Officer Stearns apparently lead to Officer Stearns
21 resigning from the grievance committee. As a result of this resignation Sergeant
22 Robertson appointed a new grievance committee consisting of the previous members,
23 absent Officer Stearns, and now including Sergeant Corey St. Pierre and Sergeant Ray
24 Vaughn. On April 21, 2009, at 10:44 p.m. Charlene Macioroski wrote to Sergeant
25 Robertson and the new committee asking for legal assistance, noting the time
26 constraints under the CBA and the timing of things in relation to her own schedule and
27 the negotiating committee.

28
29 Although it is disputed as to whether it was authorized or not, Officer Fargher advanced
30 his grievance to the Chief Executive immediately after the April 21, 2009, meeting with
31 Sheriff Walsh.

32
33 On April 29, 2009, the entire investigative report on the Cinz Bar incident was received
34 by Officer Fargher. At this point in time Officer Fargher had all the information from the
35 incident reports before him and both prongs of the grievance were ripe for
36 consideration. Suffice to say, if there were mutual mistakes in processing of the
37 grievance, and some opined that to be the case, it was immaterial at this point as
38 Officer Fargher had advanced the grievance to the Chief Executive Officer Paul Babb -
39 Step 3 of the grievance procedure.

40
41 Sergeant Vaughn, the appointed head of the new committee, met with Mr. Babb on April
42 30, 2009. Mr. Babb orally advised Sergeant Vaughn that the grievance would be
43 denied. The written denial was, in fact, issued on March 5, 2009. Because he knew the
44 grievance would be denied, Sergeant Vaughn e-mailed Office Fargher on April 30,
45 2009, advising him the denial was forthcoming and further advising Officer Fargher that
46 he if he wanted to, he could plead his case why the case should proceed to arbitration
47 before the union body at the upcoming May 5, 2009, Association meeting. It is not clear
48 when the grievance committee voted that the matter not proceed to arbitration, but it is
49 clear that action was taken as Charlene Macioroski had advised Officer Fargher of that
50 on May 4, 2009.

1 At the May 5, 2009, Association meeting the body voted to authorize Officer Fargher to
2 meet with Karl Englund, BPPA counsel, to solicit his guidance on the grievance. By this
3 point in time the Association had requested and received an extension on the grievance
4 timeframes.

5
6 Officer Fargher, his wife, and Sergeant Vaughn met with Mr. Englund on May 6, 2009.
7 Mr. Englund offered his suggestions in a letter dated May 15, 2009. Apparently he also
8 orally advised those meeting with him that a request to arbitrate might be made so as to
9 allow for possible resolution short of arbitration. That suggestion was not followed.

10
11 On May 16, 2009, Russ Robertson e-mailed the Association advising the body that a
12 special meeting would be held on May 19, 2009, to vote on whether to take the Fargher
13 grievance to arbitration. The e-mail spelled out Sergeant Robertson's interpretation of
14 Mr. Englund's thoughts on the grievance and it also advised that the letter would be
15 available for review at the meeting. It is also apparent that at some point in time the
16 letter was also posted in one location, the dispatch area. Officer Fargher contends that
17 this e-mail was sent by Sergeant Robertson "to a selected-few union members (but
18 apparently not to all union members)". In reality the e-mail list was not generated by
19 Sergeant Robertson, but was done with the assistance of Ms. Macioroski. It went to
20 approximately 70 members. At best Officer Fargher indicated the e-mail did not go to at
21 least three people with one of them being Officer Murphy. To be certain, Officer Murphy
22 was not on the list, but there is no indication this was a deliberate omission.

23
24 On May 19, 2009, Officer Fargher responded to the Robertson e-mail advising that he
25 could not attend the special meeting due to a previous commitment. Officer Fargher's
26 e-mail also disagreed with Sergeant Robertson's interpretation of the Englund letter and
27 further requested the meeting be postponed until Officer Fargher met with the grievance
28 committee. The e-mail went on to state that "You and Sgt. Vaughn appear in a real
29 hurry to settle the issue of my grievances without the Union taking further action.
30 Especially so as to your personal involvement and conflict of interest".

31
32 On May 19, 2009, Russ Robertson then e-mailed Officer Fargher advising him that the
33 grievance committee had met and had recommended the grievance be dropped short of
34 arbitration yet because of that he "thought we should have a body vote". Sergeant
35 Robertson also referenced that the extension in grievance timeframes agreed to by
36 management was all but up so there was some urgency to meet quickly.

37
38 The May 19, 2009, meeting did go forward but there was no quorum as only about eight
39 people attended. A quorum would have required 20% of the membership. At the time
40 of the meeting those present agreed that an e-mail vote was in order so Russ
41 Robertson sent out an e-mail advising the body of the vote and the need to respond to
42 him by no later than 2200 hours, Friday, May 22, 2009. This e-mail went to the same
43 list of members as did the earlier one advising of the special meeting. In the e-mail
44 Sergeant Robertson opined that "The attorney does not think we have a case that we
45 can win so the choice is yours on how the body votes". When the votes were tallied 21
46 members – a quorum - had voted with only one member voting in favor of the matter
47 proceeding to arbitration.

48
49 On May 23, 2009, Sergeant Vaughn, wrote to Officer Fargher advising him of the
50 decision that his grievance not go to arbitration.

1 The Montana Supreme Court has approved the practice of the Board of Personnel
2 Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent
3 as guidelines in interpreting the Montana Collective Bargaining for Public Employees
4 Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598
5 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of
6 Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME
7 Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the
8 extent cited in this decision, federal precedent is considered for guidance and to
9 supplement state law when applicable.
10

11
12 The gravamen of Officer's Fargher's complaint is that several members of the
13 Association discriminated against him thereby denying his rights under the collective
14 bargaining act. Hand in hand with this was what Officer Fargher describes as a conflict
15 of interest, part of which is interwoven with the duties of bargaining unit members and
16 part of which he alleges were their efforts to protect themselves from disciplinary action
17 and/or to not receive the same degree of disciplinary action as was received by Officer
18 Fargher. To be sure, there are tensions in the bargaining unit and there are
19 disagreements between Officer Fargher and others. The question is whether the
20 conduct of the BPPA and its officers and members rises to the level of a breach of the
21 duty of fair representation.
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23
24 A union violates its duty of fair representation to the employees it represents only if its
25 actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, 386 U.S. 171,190
26 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached
27 each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v.
28 O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has
29 adopted the Vaca standard and in Ford v. University of Montana and Missoula
30 Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana
31 Supreme Court in reviewing an unfair labor practice charge brought before the Board
32 held:
33

34
35 In short, the Court has to find that the Union's action was in some way a product
36 of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford
37 disagrees with the decision of the Union [in determining that her grievance was
38 without merit] is not sufficient basis for a finding of breach of the duty of fair
39 representation absent these factors.
40

41
42 The Montana Supreme Court has also recognized that "it is well settled in federal labor
43 law and therefore under Montana labor law that a union may not arbitrarily ignore a
44 meritorious grievance or process it in a perfunctory manner". Teamsters Local #45,
45 Affiliated with International Brotherhood of Teamsters vs. State of Montana ex. rel Board
46 of Personnel Appeals and Stuart McCarvel, 635 P.2d 1310, 38 St.Rep 1841 (1981),
47 43 St Rep 1555 (1986).
48

49 Applying the arbitrary prong to the allegations, Officer Fargher has argued that the
50 actions of Sergeant Robertson and Sergeant Vaughn were arbitrary and a denial of his

rights. In the instance of Sergeant Vaughn a primary issue is that he met with CEO Babb without Officer Fargher in attendance. As mentioned before, there was some question as to whether the grievance properly proceeded to CEO Babb, and thus there may have been some question as to whether the meeting should have been held in the first place. This is a mitigating factor in Sergeant Vaughn's actions. Beyond this there is nothing in the contract that requires the grievant be in attendance and be that as it may, the dice were cast and a reasonable assumption was that the CEO would uphold the management actions to date. In fact that was the case so it is hard to see any prejudice to Officer Fargher. Aside from this issue, there is nothing to show that Sergeant Vaughn failed to carry out his duties as grievance chair. He ensured timelines were met and did nothing outside the bounds of reasonableness in his role as grievance chair.

In the instance of Sergeant Robertson, to be certain, there is apparent ill will between Sergeant Robertson and Officer Fargher. That said, it is not shown said that the actions taken by Sergeant Robertson were unreasonable or based on his personal feelings toward Officer Fargher. Sergeant Robertson did participate in e-mails questioning Officer Fargher's use of force as well as the thoroughness of his incident report but that was a part of his role as assistant shift commander and was done at the request of his superiors. In the case of the use of force, the issue was actually brought up by the captain, not the sergeant. Even if not asked, and he offered information on the incidents, offering this information appears to be a part of an assistant or shift commander's job responsibilities. Beyond this there is nothing offered, nor could the investigator find anything, to indicate that there is any sort of conflict of interest provision in by-laws, the constitution or even practice of the BPPA to say that a union member needs to step away from incidents in which they were involved. There may be some logic in doing so, but it is not a requirement. In total, there was no arbitrary action taken by the BPPA. In fact, the record shows that reasonable efforts, not always perfect, but nonetheless reasonable, were made to inform and assist Officer Fargher in his grievance. He was afforded representation in all phases of the grievance procedure. He was provided due process up to and including two meetings of the body, an e-mail vote of the body, a grievance committee the membership of which he influenced in the case of Officer Stearns, as well as an opportunity to meet with BPPA counsel regarding the merits of his grievance.

The second prong of the test for a breach of the duty of fair representation is discrimination. There are no allegations made, nor is there any evidence found by the investigator, that the BPPA discriminated against Officer Fargher in the sense of Officer Fargher being in a protected class. Moreover, nothing developed in the investigation is compelling to show that he was discriminated against in asserting his protected rights under the bargaining act.

In terms of the third prong of the test, bad faith, the good-faith conduct of a union is preserved unless it can be demonstrated that the conduct is sufficiently outside a "wide range of reasonableness" so as to be considered irrational. To establish a lack of good faith there must be evidence of fraud, deceitful action, or dishonest conduct by the

union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM 3004 (8th Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143 LRRM 2400 (10th Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And, as the Ninth Circuit held, there is a mandated deferential standard of review in evaluating union actions and they can be challenged successfully only if wholly irrational and even "unwise" or "unconsidered" union decisions will not rise to the level of irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9th Cir. 1994). As has been indicated, Officer Fargher does have issues with Sergeant Robertson. From what the investigator understands these issues, including Sergeant Robertson's actions in the Cinz Bar incident, are subject to an action brought by Officer Fargher with the police commission. Whether that is, or is not the appropriate forum will be decided by that body, but the point is that in terms of its obligation to fairly represent Officer Fargher the Association did not engage in bad faith, fraud, deceitful action or dishonest conduct. Ultimately Officer Fargher disagrees with the decision of the body, but that in and of itself it not sufficient to constitute a breach of the duty of fair representation.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charge 27-2009 be dismissed.

DATED this 10th day of August 2009.

BOARD OF PERSONNEL APPEALS

By: _____/S/

John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy
of this document was mailed to the following on the _____ day of _____
2009, postage paid and addressed as follows:

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